Supreme Court, U.S.
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No. 99-131

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER MICKLE, et al.,
Petitioners,

v.

MICHAEL MOORE, et al.,
Respondents.

"IN RE: LONG TERM ADMINISTRATIVE SEGREGATION OF INMATES DESIGNATED AS FIVE PERCENTERS"

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

Throughout its brief, the SCDC denies that petitioners have been placed in long-term segregation (or "reclassified to a higher security level," *Resp. Br.* at 8) because of their religious beliefs. Rather, it argues, petitioners are locked down because they are affiliated with the Five Percent Nation of Gods and Earths (or "the Five Percenter Group," *Resp. Br.* at 9). The SCDC "does not require any inmate to renounce any religious beliefs": an inmate retains the "prerogative" not to renounce his affiliation with the Five Percent Nation, but if he exercises that prerogative he must remain in segregation. *Resp. Br.* at 9.

The SCDC can make these inconsistent assertions only because it denies that the Five Percent Nation is a religion. It has maintained this position throughout this litigation. See App. at A-7, A-35. This position, however, is not tenable given the procedural posture of this case. Petitioners presented extensive evidence in the district court -- an expert declaration, religious texts, declarations from individuals describing their spiritual beliefs -- showing that the Five Percent Nation is a religion entitled to protection under the First Amendment. In analyzing the SCDC's motion for summary judgment, both the Fourth Circuit and district court below assumed this to be true. App. at A-7, A-20-21.

For most petitioners, their religious affiliation is the only explanation for their placement in segregation. The SCDC repeatedly refers to "violence, disruption and other antisocial behavior"; under its segregation policy, it writes, inmates "are prohibited from acting in a violent or dangerous manner." *Resp. Br.* at 8-9. But it is undisputed that most of the hundreds of inmates whom the SCDC has segregated since June 1995 pursuant to its policy have had *no* involvement in gang activity or other institutional violence or mis-

conduct. For example, lead plaintiff Alexander Mickle has been in segregation now for more than four years. Prior to his placement there, he was classified at a very low security level and had no record of disciplinary violations. The SCDC has not disputed petitioners' evidence showing that the institutional behavior of Mickle and such other petitioners as Shaleek Azeem, Walter Jenkins, and Ameed Stevenson has been excellent. There is simply no basis in the record for describing them as "violent and dangerous" prisoners.

The SCDC navigates this problem by arguing (*Resp. Br.* at 8-9) that it decided to segregate petitioners not because of their own conduct, but rather because of "behavior by members of the Five Percenter group." Petitioners submit that it is repugnant to the First Amendment and the principle of due process for government to punish innocent individuals based upon its impression of their religious group in general. Furthermore, the courts below refused to acknowledge the extent to which the SCDC's view of the Five Percent Nation as a "violent and dangerous" group is factually disputed. The SCDC maintains that the Five Percent Nation is a gang; petitioners presented evidence below that it is not. The SCDC maintains that the Five Percent Nation is racist; petitioners presented evidence below that it is not. The SCDC maintains that the Five Percent Nation encourages violent behavior; petitioners presented evidence below that Five Percent Nation discourages violence and other antisocial conduct, and that in fact the Five Percenter beliefs have influenced many adherents to behave peacefully in society and improve relationships with others.

This is the evidence that the Fourth Circuit expressly refused to consider, stating that "to draw these inferences in the inmates' favor would turn *Turner*'s command of judicial deference on its head." App. at A-10. The SCDC is wrong to assert (*Resp. Br.* at 11-12) that the evidence the Fourth Circuit disregarded was

"simply not material" to this case. Evidence about petitioners' religious beliefs and the nature of the Five Percent Nation generally is critical to any objective evaluation of the SCDC's policy under the First Amendment. No amount of "deference" or aversion to "second-guessing" (*Resp. Br.* at 11) can excuse the fundamental unfairness that has occurred in this litigation thus far: petitioners have been treated harshly for years based on the SCDC's assertions about the dangerousness of their religious group, and yet their evidence disproving these assertions has not been credited. A trial is necessary to resolve these factual disputes conclusively.

Respondents argue (*Resp. Br.* at 7) that petitioners are "procedurally barred" from seeking heightened scrutiny of the SCDC's segregation policy under the First Amendment. It is respondents, however, who are barred: they did not raise this argument in their brief to the Fourth Circuit below, a failure which amounts to waiver. See, e.g., Shopco Distrib. Co., Inc. v. Commanding Gen., 885 F.2d 167, 170 n.3 (4th Cir. 1989); Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 692 (4th Cir. 1978). The Fourth Circuit considered petitioners' arguments analogizing this case to Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), and others involving government policies targeting particular religious beliefs, but rejected the analogy on its merits: "restrictions that would clearly violate the Constitution outside the prison setting may be rationally based within that setting." App. at A-7 n.4. This case deserves review because even in the prison setting, "the principle that government may not enact laws that suppress religious belief or practice" may not be abrogated. See Church of Lukumi, 508 U.S. at 523.

Respondents suggest (*Resp. Br.* at 8 & n.2) that the ruling in Cooper v. Pate, 378 U.S. 546 (1964), is no longer good law after Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). This Court, however, has continued

to cite Cooper with approval. See McCarthy v. Bronson, 500 U.S. 136, 141-42 (1991). The Seventh Circuit has stated that "O'Lone and Turner have served to clarify and amplify, rather than to depart from, the standard applied in [Cooper]." Hadi v. Horn, 830 F.2d 779, 784 n.6 (7th Cir. 1987); accord Sutton v. Stewart, 22 F. Supp.2d 1097, 1106 n.14 (D. Ariz. 1998), aff'd, ___ F.3d ___, No. 98-16680, 1999 WL 435837 (9th Cir. Jun. 16, 1999). Thus, the principle that courts must "closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion, and especially so where the adherents of one faith are more heavily restricted than adherents of another," Cooper, 382 F.2d at 521, is reflected in Turner's requirement that "prison regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the expression," 482 U.S. at 90.

Respondents fail to explain (*Resp. Br.* at 7-8) how the holding in Cooper is not "directly on point" here. Both cases involved inmates who had been placed in segregation because of their religion. In Cooper, the inmate, a member of the Nation of Islam, had alleged this fact in a complaint. This Court reversed the lower courts' dismissal of the inmate's claim, stating that the First Amendment does not allow prison officials to discriminate against an inmate "solely because of his religious beliefs." 378 U.S. at 546. On remand, the Seventh Circuit held unconstitutional many of the challenged prison policies, but upheld the placement of the inmate in segregation because it was "for normal disciplinary reasons and not because of any religious beliefs he may hold." Cooper v. Pate, 382 F.2d 518, 523 (7th Cir. 1967).

Petitioners in this case do not seek an end to segregated confinement altogether, and certainly not as a means of discipline or preventing future disturbances. They do not suggest that the First Amendment prevents "prison administrators from being proac-

tive rather than reactive." See *Resp. Br.* at 9. But proactive prison management does not require the suppression of an entire religious group, especially where the evidence is disputed as to whether its members present any real threat to prison security at all. Under the SCDC's policy, petitioners have spent years in extremely restrictive segregation, not because of any evidence showing that they misbehaved in the past or are likely to do so in the future, but because of the religious beliefs they hold. This government policy is inimical to the First Amendment and warrants review by this Court.

CONCLUSION

For the reasons set forth above and in their petition, this Court should grant petitioners a writ of certiorari.

Respectfully submitted,

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